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PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 186

LUIS ESTRADA MOYA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONER

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Introduction

In summary, petitioner's position is that he was denied due process by the State of California; that due process, particularly in a capital case, is denied when a trial is influenced by prejudicial action of the district attorney and other state officers; that pre-trial news publications engendered a community atmosphere wherein petitioner could not be afforded a fair trial; that the principal source of the pre-trial publications was the district attorney and other state officers; that the character of the published material was highly inflammatory and prejudicial; that the trial judge did not act reasonably in denying motions for change of venue; and that the trial judge contributed

to the community hostility by permitting courtroom photography and by published comments concerning change of venue and by his published comments approving death verdicts in cases of two co-defendants.

Respondent replies with a variety of contentions; that petitioner's brief is completely misleading; that the conduct of the district attorney in releasing prejudicial material for publication is not in issue; that the material published ultimately was brought out in trial; that there was no proof that any juror who served was affected by the pretrial publications; that the trial judge acted reasonably in denying change of venue; and that petitioner at time of trial did not believe that any juror was biased.

I.

Petitioner's Brief Fairly States the Facts.

Respondent begins with a bald assertion that "Moya's brief distorts the facts, go beyond the record and is completely misleading." In support of this blanket accusation, respondent cites several claimed misleading statements.

Respondent contends that petitioner and co-defendants were not arrested for murder until after indictment on December 26, 1958. It is clear that petitioner and co-defendants were arrested on or before December 15, 1958, primarily as murder suspects and only incidentally for other technical reasons as reported in news publications.

Exhibit 11, Star-Free Press, Dec. 15, 1958:

> "But there were indications of more serious charges. Said Woodruff J. Deem, chief criminal deputy of the district attorney's office: 'When we have a suspected murder case, we don't give hints.'"

Exhibit 13, Star-Free Press, Dec. 18, 1958:

"'I feel very strongly,' Gustafson said, 'that there might not have been any disappearance (of Olga Duncan) had we been able to move on the case in October.' . . . The possibility of homicide was voiced yesterday in court by Gustafson as he opposed bail reduction on Elizabeth Duncan."

"Gustafson opposed the reduction of bail, drawing a parallel between the Duncan case and the L. Ewing Scott case in Los Angeles recently. He pointed out that when Scott's bail was reduced to $25,000, the suspect in his wife's murder left the country."

Exhibit 15, Star-Free Press, Dec. 20, 1958:

"The weird Olga Duncan disappearance case took an important turn late yesterday in Santa Barbara when her mother in law (Elizabeth Duncan) and two men (Moya and Baldonado) were charged with conspiracy to commit murder and kidnapping."

Exhibit 16, Star-Free Press, Dec. 23, 1958:

"Gustafson said he discounted the blackmail claim and observed that as far as he was concerned the only reason Moya and Baldonado sought money from Mrs. Duncan was because 'they wanted the pay they were promised for the job they did.'".

The reason why petitioner and co-defendants were not formally charged with murder was apparently explained to the press by the district attorney as reported in Exhibit 18, Star-Free Press, Dec. 26, 1958:

"Gustafson now had all three central figures in the slaying case in jail, but not as suspects in a murder. All were booked on other charges. Mrs. Duncan as a

suspect in a fake annulment scheme, Moya as a parole violator, and Baldonado on failure to provide. This allows Gustafson to call all before the Grand Jury in the inquisition into Olga's murder. As defendants they could not be called. Now they must either testify or state their reasons which can only mean fear of self-incrimination."

Under California law, a person could be called as a witness before a Grand Jury and even though the Grand Jury was summoned to investigate charges against that person, he could not refuse to be sworn as a witness. *In re Lemon*, 15 C.A. 2d 82, 59 P. 2d 213.

Respondent accuses petitioner of stating falsely that the population of Ventura County was approximately 170,000. Respondent apparently overlooked the fact that he introduced the affidavit of Volney Cummins in connection with hearing on change of venue, which affidavit contained the following statement: "The population of Ventura County is approximately 170,000" (TR 26). The Federal Census shows a population of 199,138 in 1960 and a population of 114,647 in 1950. The estimated population according to the State of California Department of Finance as of January 1, 1959, was 180,400. (*Directory of State Services of the State of California* 1959.)

Respondent further complains that petitioner is misleading the court for the reason that petitioner did not quote from all the newspaper exhibits, and further that petitioner did not introduce all newspaper exhibits carrying accounts of the case. The record shows that during the two separate hearings on change of venue, respondent introduced no newspaper exhibits whatever himself. He certainly cannot seriously complain at this time about the absence of newspaper exhibits. Further, it would have

been practically an impossibility to introduce all newspapers carrying accounts of the case. As for petitioner's objecting to a courtroom photograph, the record is clear that petitioner made his first motion for change of venue as early as January 13, 1959, on the specific grounds that prejudicial pre-trial publicity would prevent a fair trial in Ventura County. This should have served as a clear and adequate objection to further pre-trial publicity including, of course, courtroom photography. Petitioner was not in a position to specifically object in the trials of co-defendants Duncan and Baldonado because he was not a party litigant in either trial.

With respect to the tape recorded confession of petitioner, respondent falsely states that the contents of the tape recording "were not released to the public by any law enforcement personnel." This court's attention is invited to the following in Exhibit 18, Star-Free Press, December 26, 1958:

> "Moya reportedly told about the same story as Baldonado of the murder. Gustafson said the confession revealed the pair had driven to the apartment of Olga on November 18 and that Moya had gone to the door, telling the attractive nurse that her husband, Frank, from whom she was estranged, was in the car and wanted to talk to her."
>
> "Higgins, a 40 year old ex-torpedoman in the Navy, not retired, became a local hero in the proceedings when he obtained the confession despite the fact that he failed an examination for promotion recently and is the lowest paid deputy.
>
> "Moya's confession added the last few pieces to the puzzle which had confronted investigators in the bizarre killing-for-hire and pinpointed the method in

which Olga was lured to her death. He said Mrs. Duncan promised $6,000 for the job.

"He said he went to Olga's apartment, told her that her husband Frank wanted to see her in a car outside. She came to the car in bathrobe and nightgown, looked in the car to find Baldonado and not her estranged husband, at which time Moya said he struck her with a borrowed .22 caliber pistol as Baldonado dragged her into the car."

"Moya, like Baldonado before him, told officers they were hired by Mrs. Elizabeth Dun, 54 year old mother-in-law of Olga, to do the job.

"Moya then said he struck the woman over the head with a borrowed .22 caliber pistol as Baldonado dragged her into the car. They beat and strangled her, finally burying her in a shallow grave in the Casitas Pass area, it was reported.

"Gustafson said he had to remake his plans for the grand jury hearing at the last minute."

By the time that the tape recording was released by petitioner to be played by a local radio station, the district attorney and other law enforcement officers had already been responsible for releasing selected portions of the alleged confession, had already released a great bulk of prejudicial material for publication, the trial judge had denied change of venue, the trial judge was reported as ordering a couple of banks of lights turned on in the courtroom for the benefit of photographers, an early trial date had been set, and petitioner's court appointed counsel had been denied a continuance of trial on grounds of insufficient time to prepare. Petitioner was therefore forced to use some means to attempt to appeal to the same public

which had been prejudiced against him by prior actions of the district attorney and other state officers.

Respondent certainly cannot contend that petitioner's counsel caused this to be done to further prejudice his client's position. Of course, the reported excerpts of the tape recording released to the press by the district attorney did not tell the true story. The tape recorded statement contained emotional outbursts of remorse, sobbing and weeping of petitioner in great contrast to the cold, cruel-sounding version previously released by the district attorney to the press.

Respondent is correct that the Santa Paula Chronicle is the third daily newspaper in Ventura County. This was overlooked by petitioner and for good reason. According to the *Directory of Newspapers and Periodicals*, 1959, N. W. Ayer and Sons, Philadelphia, Pa., the Santa Paula Chronicle was published five days a week with a circulation of 2,807.

Concerning the general character of Ventura County, that is best described in a column appearing in Exhibit 27, Star-Free Press, December 29, 1958, wherein it is called a "cow county."

> "Ventura County played 'host' to a number of visitors last week which it was not geared to accommodate.
>
> "These were members of the press who gathered to dig out facts (and fancy) about the characters in the grisly Olga Kupczyk Duncan murder case.
>
> "At times, there were 30 reporters and cameramen in the Ventura County Courthouse and because the usual quota is four or five, there are no facilities for this number . . .
>
> "The visiting press developed opinions of some of the 'cow county' officials that surprised even themselves.

The metropolitan press men and women are used to dealing with officials who are used to hustle and bustle of big murder trials on almost a daily basis . . .

"For District Attorney Roy A. Gustafson, they held respect for legal capabilities when the week long indictment drama was over. The consensus was that Gustafson took a hold of the dilemma by both horns and, if this be a cow county, he rode it to the finish.

"The visiting press, and the hometown boys as well, felt Deputy Sheriff Ray Higgins was somewhat of a hero in the case . . .

"Someone needed to take charge of the host duties in the courthouse halls and provide the press with some services.

"Clarence 'Clary' Henderson, D.A.'s investigator, assumed the role. He arranged for photographs of the murder suspects. He provided names of the witnesses who had appeared before the Grand Jury . . ."

II.

The Conduct of the District Attorney in Publishing Prejudicial Material Prior to Trial Is Not Only Material But Constitutes a Direct Violation of Due Process by the State.

Respondent contends that the conduct of the district attorney is not in issue. The district attorney himself apparently was of the opinion that his conduct was in issue at an early stage of the proceedings. On January 13, 1959, in hearing on change of venue, he introduced the affidavit of the managing editor of the Ventura County Star-Free Press denying that an alleged statement of the district attorney was published (TR 22-23). The district attorney offered his own affidavit admitting that a particular state-

ment was made and denying that another statement was made by him (TR 24-25). He did not deny making any other statements attributed to him until oral argument before the California Supreme Court when he claimed for the first time that he had been misquoted in one particular respect. The district attorney did not deny making *most* of the statements attributed to him as reported by the opinion of the California Supreme Court but claimed only that he was misquoted in one particular statement.[1]

Respondent then contends that his conduct is not in issue here but the only issue is what effect the published reports

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[1] Transcript of Oral Argument Before California Supreme Court, P. 26 and 27:

(Petitioner is informed and believes that this transcript is being certified to the Court along with request to augment record.)

Mr. Gustafson: I did not ever say anything about seeking the death penalty against any or all of these defendants at any time prior to the time that I addressed the jury.

Why didn't I issue a retraction or demand a retraction when I did see—and I admit I saw—this report of an interview, in the paper, in the Star Free Press? And I had granted an interview, Mr. Justice Peters, and it was with respect to why did I think the death penalty should be retained in California, and it was not with respect to any of these three defendants at all. It was just on the general proposition of the reason for retention of the death penalty.

Mr. Justice Peters: So far as the record is concerned, this is the first denial you have made of that interview, is that correct? Do I understand that from your statement?

Mr. Gustafson: Yes, and I will explain—

Mr. Justice Peters: And we are to ascertain the state of mind of the jurors at the time they were chosen, and pass on this case by your denial now?

Mr. Gustafson: No, because—I would like to explain why there hasn't been one up until this time and why I think it is unimportant in that respect.

Mr. Justice Peters: I think it is highly improper to refer to matters outside of the record.

Mr. Gustafson: I don't think I am referring to any matters outside the record. I think I am explaining why it is immaterial whether there was or wasn't a denial.

had upon prospective jurors. Respondent appears to overlook as the district attorney overlooked through the proceedings that the district attorney is a state official and that he acted in behalf of the State of California. Cases dealing with pre-trial publication of prejudicial material have considered important the source of the published material. *Delaney* v. *U. S.* (C.A. 1st), 199 F. 2d 107; *Shepherd* v. *Florida*, 341 U.S. 50; *Stroble* v. *California*, 343 U.S. 181. The problem is analogous to conduct of the prosecutor in the knowing use of perjured testimony (*Napue* v. *Illinois*, 360 U.S. 264) willful suppression of evidence (*U. S. ex rel. Almeida* v. *Baldi* (C.A. 3), 195 F. 2d 815) and use of brutality or methods which shock the conscience (*Rochin* v. *California*, 342 U.S. 165).

Respondent weakly contends that the highly inflammatory statement headlined "D. A. URGES DEATH TERM IN KILLINGS" was simply a routine statement concerning legislative policy. However, there is no explanation why the district attorney chose to release the "routine" statement to the press the very day that he released in detail the alleged confession of co-defendant Baldonado. The newspaper contains not the slightest mention of any legislative action on the death penalty. The legislature was not then in session and was not scheduled to be in session until after January 1, 1959.

III.

The Pre-Trial Publications Contained Prejudicial Material Which Was Not Brought Out at Trial and Which Would Not Have Been Admissible as Evidence in Trial.

The fundamental harm flowing from pre-trial publicity lies not in the relative truth or falsity of the reported statements. The vice is that pre-trial publicity violates concepts of ordered liberty which are underlying reasons for procedural safeguards. It is contrary in principle to fundamental concepts such as the presumption of innocence, the right to counsel, the right to jury trial, the right to have the truth or falsity of the charges ascertained in a court of law, the right to confront witnesses against him, the right to cross examination, the right to not be made a witness against himself, the right to have evidence against him under oath, the right to opportunity to defend, and the right to all procedural safeguards to insure uniformity of treatment and protection of civil rights.

Concerning the assertion that nothing appeared in the newspapers that was not brought out during trial, petitioner cites the following published material which was not brought out at the trial and which would not have been admissible under the rules of evidence:

In Exhibit 31, Los Angeles Times, December 23, 1958, Los Angeles Police Chief Parker reported that witnesses Mrs. Emma Short and Mrs. Esperanza Esquivel were given lie detector tests, that Mrs. Esquivel disclosed that Mrs. Duncan had asked her to help find someone who would get rid of her daughter-in-law, that she introduced Mrs. Duncan to Moya and Baldonado, that they rented the kidnap car from Mrs. Sarah Contreras, and that Mrs. Short and Mrs. Esquivel have been secreted away at their own

request. Evidence of a lie detector test by a witness is not admissible. *People* v. *Aragon*, 154 C.A. 2d 646, 316 P. 2d 370.

A statement in argument by a district attorney inferring his personal belief concerning the guilt or innocence of a defendant is error. *People* v. *Hidalgo*, 78 C.A. 2d 926, 179 P. 2d 102; *People* v. *Podwys*, 6 C.A. 2d 211, 34 P. 2d 467; *People* v. *Edgar*, 34 C.A. 459, 167 P. 891. Yet, the following was published:

Exhibit 14, Star-Free Press, December 19, 1958:

"'She (Mrs. Elizabeth Duncan) has been through enough annulment proceedings,' Gustafson said, 'to have known that what she obtained here August 7th was not a legal annulment.'"

Exhibit 3, Star-Free Press, December 22, 1958:

"Gustafson said he believed that the motive for the hired killing was jealousy."

Exhibit 16, Star-Free Press, December 23, 1958:

"Gustafson said he discounted the blackmail claim and observed that as far as he was concerned the only reason Moya and Baldonado sought money from Mrs. Duncan was because 'they wanted the pay they were promised for the job they did.'"

Exhibit A-55, Star-Free Press, March 18, 1959:

"District Attorney Roy A. Gustafson said: 'If I didn't believe her guilty, I would n't have prosecuted her.'"

No evidence was admitted concerning any threats or attempts of petitioner or co-defendants to intimidate witnesses. Yet, there was published the following:

Exhibit 9, Star-Free Press, December 29, 1958:

"Gustafson said that he has received reports of written threats received by persons in Santa Barbara who have been questioned about the case. He said threats of bodily injury were made but that he doesn't know whether this was the work of cranks or if the threats came from someone who might be involved in some way in the murder for hire case."

Exhibit 14, Star-Free Press, December 19, 1958:

"Mrs. Short, Gustafson said, has provided important information in the case and expressed her desire to have her whereabouts kept a secret. 'We are assisting her in doing so,' Gustafson said."

Exhibit 16, Star-Free Press, December 23, 1958:

"Gustafson said he is preparing his presentation for the Grand Jury Friday and will call 'maybe a dozen' witnesses. He indicated some of the principals in the case would appear, including Mrs. Duncan, Augustine Baldonado, 25 year old confessed killer of Olga Duncan; Mrs. Esperanza Esquivel, Santa Barbara, who reportedly introduced Baldonado and Luis E. Moya to Mrs. Duncan; Mrs. Emma D. Short, Santa Barbara, who accompanied Mrs. Duncan and Ralph Winterstein to Ventura August 7 to obtain a fake annulment of the Duncan-Kupczyk marriage. Mrs. Esquivel and Mrs. Short both had at their own request been hidden out for the past several days. Gustafson said . . ."

Exhibit A-54, Star-Free Press, March 16, 1959:

"GUSTAFSON EXPLAINS 'BAD LIGHT'

"'In my argument last Friday I used the word "ashamed" with reference to the actions of some judges

and lawyers. I intended to and should have said that I regret, as I am sure they do, that the procedures actually allowed a delay during which the after-events proved Mrs. Duncan was actually conspiring to take the life of her daughter-in-law.'"

It has been held error in federal courts to appeal to patriotism and national emergency. *Viereck* v. *U. S.*, 318 U.S. 236. It is error to urge conviction because of prevalence of crime. *Turk* v. *U. S.* (C.A. 8), 20 F. 2d 129. Yet there was published the following:

Exhibit A-36, Star-Free Press, March 21, 1959:

"MRS. DUNCAN TO DIE

"District Attorney Roy A. Gustafson hailed the verdict and said it should have an effect on heading off moves to abolish the death penalty in California."

Exhibit 3, Star-Free Press, December 22, 1958:

"D. A. URGES DEATH TERM IN KILLINGS" (Pet. Op. Br. 13-14).

Exhibit 8, Star-Free Press, December 30, 1958:

"ROY GUSTAFSON EXPLAINS WHY HE WILL ASK DEATH PENALTY FOR DUNCAN MURDER TRIO" (Pet. Op. Br. 25-27).

Respondent attempts to leave the impression that this case involved only a few out of court statements by the district attorney at the outset of the case. On the contrary, the district attorney pursued a consistent policy of statements to the press. In addition to the more damaging out of court statements of the district attorney cited in petitioner's opening brief, the following occurred:

Exhibit A-41, Star-Free Press, February 21, 1959:

"Gustafson said he will begin his presentation Tuesday with a 'very brief' opening statement. He refused to comment about which witnesses he will present first. He said earlier he has subpoened 'around a hundred' witnesses."

Exhibit A-44, Star-Free Press, February 28, 1959:

"Commenting on Baldonado's statement that he did not plead guilty to first degree murder, Gustafson said both he and Moya who face trials in April 'will be up for the death penalty.'

" 'Had I been willing to stipulate to life imprisonment, there would obviously have been no trials,' Gustafson remarked."

Exhibit A-46, Star-Free Press, March 3, 1959:

"Gustafson told reporters Mrs. Duncan's alleged statements admitting the payments are important to his case even though she ascribes a different reason for them than does the prosecution . . . Gustafson said it is his view that the only possible verdicts in the case are first degree murder or acquittal."

Exhibit A-10, Star-Free Press, March 5, 1959:

"Gustafson explained the presence of court appointed psychiatrists Dr. Louis R. Nash and Philip R. A. May by reminding reporters that Sullivan had forbidden his client to discuss the murder case with them during their psychiatric examination. He indicated they wanted to hear her story about the crime."

Exhibit A-49, Star-Free Press, March 9, 1959:

"DUNCAN LOVE A LIE, SAYS GUSTAFSON.

"District Attorney Roy A. Gustafson said today he will show that Frank Duncan's professions of love for his murdered wife, Olga, are false."

Exhibit A-56, Star-Free Press, March 19, 1959:

"As a result of these and other lies, Gillis testified, he was not allowed to take the examination.

"(Gustafson told reporters later that the bar board now has changed its mind and Gillis will be allowed to take the examination in the near future.)"

Further, the district attorney was mentioned and photographed in practically every week-day issue of daily newspapers circulated in Ventura County throughout the time consumed by the trial of Elizabeth Duncan, which was from February 16, 1959, through March 20, 1959. His courtroom comments were often quoted in newspapers and were extremely damaging to petitioner, such as in the following:

Exhibit A-53, Star-Free Press, March 14, 1959:

"Gustafson said it would be the grossest miscarriage of justice if Mrs. Duncan is acquitted and her hirelings stand convicted 'as they already are.'

"(Moya and Baldonado have withdrawn pleas of not guilty to first degree murder of Olga and face separate trials in April on penalty and sanity.)

"Gustafson told the jury he 'suspects' both will be sentenced to the gas chamber."

IV.

There Is Ample Proof Under the Circumstances That Jurors Were Affected by the Pre-Trial Publicity.

Respondent contends that there is no proof that any of the jurors who served read the news articles or were affected by pre-trial publicity.

First of all, respondent assumes that there was searching voir dire examination permitted. This was not the case. As an example, consider the voir dire examination of prospective juror Conley:

> Q. Did you read in the Oxnard Press Courier about the result in the Augustine Baldonado case?
>
> A. I did.
>
> Q. Did you read that he received the death penalty?
>
> A. Yes, I did.
>
> Q. And did you read the comments that were reported that Judge Blackstock made about complimenting the jury for their courage and intelligence?
>
> A. I did.
>
> Q. Do you know Judge Blackstock?
>
> A. I do not.
>
> Q. You have heard of him though, have you not?
>
> A. Oh, yes.
>
> Q. The fact that you have read such a comment as that influence your decision in this case against Luis Moya?
>
> A. Not at all.
>
> Q. The fact that both Elizabeth Duncan and Augustine Baldonado received the death penalty have any influence on you in this case?
>
> A. No.
>
> Q. Do you have any opinion now as to what penalty (fol. 94) should be imposed upon the defendant.

A. Well, truthfully, I thought I did, but I'm not sure that I really did. I think one should listen to the evidence.

Q. Well, I mean you're not just saying that so that the Judge or somebody won't—

A. No, because I feel there is always a reason for doubt, room for doubt.

The Court: You will decide this case entirely on the evidence that may be adduced in this case itself?

Prospective Juror: That's right.

The Court: And nothing else? Right?

Prospective Juror: Yes, sir.

The Court: Is that right?

Prospective Juror: Yes, sir.

Mr. Henson:

Q. Do you feel that in every case of willful, deliberate and premeditated murder, that the perpetrators should be given the death penalty?

A. Well, if it could be proven beyond a shadow of a doubt.

Q. In other words, in every case where it has been proven that the defendant has committed willful, deliberate and premeditated murder, you would vote for the death penalty, is that right?

A. Well, that is the way I feel now.

The Court: Well, wouldn't it depend upon the evidence (fol. 95) in the case?

Prospective Juror: Yes, that is true.

Mr. Henson:

Q. Well, Mrs. Conley, do you understand that the defendant here has pleaded guilty to willful, deliberate and premeditated murder, and there will be no question about that whatsoever.

A. Well, I just felt that there were things that could come up to prove differently.

The Court: There is only one question to be determined here, that is the penalty to be inflicted.

Prospective Juror: Oh.

The Court: You must inflict one of two penalties, either the death penalty or life imprisonment, one or the other. You have to make up your mind which one.

Prospective Juror: I see.

The Court: And you must predicate your verdict, no matter what it is, on the evidence adduced in this trial, and if you thought there was something in the case that justified your inflicting the death penalty, you do that, and if you thought there was something that justified your giving life imprisonment, you would do that, wouldn't you?

Prospective Juror: Yes, right.

Mr. Henson:

Q. Mrs. Conley, let me get this clear here now. Do you feel that in every case of willful, deliberate and premeditated murder, that the death penalty should be inflicted?

(fol. 96) A. I guess I would say no in that case, because there could be exceptions. I would want, like I say, to decide that.

The Court: You would want to be sure that the evidence showed something that justified life imprisonment, wouldn't you?

Prospective Juror: Yes, your Honor.

The Court: And if it did then, you wouldn't inflict the death penalty, and if it did not you might inflict the death penalty?

Prospective Juror: Yes, sir.

The Court: That's entirely within the discretion of the jury (TR 235-237).

Obviously, the form of questions asked by the trial judge left the prospective juror no choice except to give answers which would qualify her as a trial juror.

Secondly, it cannot be assumed that jurors give truthful answers on voir dire examination. The following are excerpts from several textbooks on trial practice.

TRIAL STRATEGY, *William Scott Stewart,* 1940, The Flood Company, Chicago, at p. 142:

"Don't take the word of the prospective juror that he is not prejudiced and will be fair—often his ideas of fairness are remote from yours."

COURTROOM STRATEGIES, *Ben W. Palmer,* Prentice-Hall, 1959, at p. 158:

"Unless a member of the panel is excluded from service in the particular jury because of some statutory ground, you come to a more difficult problem. The problem is to detect bias or prejudice, hostility to your client or undue friendship with your adversary, if it is not apparent on the face of the situation. If there be be no blood or business relationship, your problem is to detect a bias that is hidden, in fact, in some cases is not even known to the person subject to the bias. For it often happens that a juror has unconscious prejudices, friendships and hostilities . . . of which he is not aware."

P. 160:

"The difficulty with prejudices as we all know is that most men regard their opinions as convictions. They

are ashamed to admit that they have any prejudices—unless they are seeking to escape jury duty."

PLANNING AND TRYING CASES, *Charles W. Fricke*, West Publishing Co., 1957, at p. 124:

"If the case is one which has had some notoriety, it should be anticipated that one or more of the jurors has read about it in the public print or has discussed or heard discussed the facts or purported facts. The answers which such a juror may give on voir dire may be influenced by his desires to serve as a juror in the case, or a desire to avoid that service.

"It is not surprising to the experienced courtroom habitue how many jurors, in a case which has received much mention in the public press, have either 'read only the headlines' or 'formed no opinion' from what they read or heard discussed. Human curiosity and interest in sensations is so natural that one doubts an answer to the effect that only the headlines were read, and, if we take at its face value, an answer that the juror formed no opinion when he read or heard discussed the purported facts of the case, we can only conclude that the juror either lacks in normal intelligence or that he has intended by his answer that he formed no such opinion as would have any influence upon his verdict should he be accepted as a juror."

P. 95:

"It is natural that jurors generally would like to avoid trying cases in which the testimony is likely to be disgusting and obscene and to have a distinct desire to serve on cases that are sensational or otherwise interesting to them, and, while it should not be so,

these inclinations and desires not infrequently affect the answers given by them while under voir dire examination. This is sometimes quite evident when a juror, having observed that certain answers to questions, put to previously examined jurors, have resulted in their being excused or challenged, adopted similar answers for his replies or, if he is desirous of getting in the case, avoids making such answers."

Voir dire examination in petitioner's case presented other practical problems. To examine a prospective juror in great detail concerning a specific news report would mean informing the rest of the prospective jurors as to the contents of the news report. The repetition of detailed examination of a juror concerning news publications would simply increase the effect of the publications upon the other prospective jurors present.

V.

Petitioner Made His Position Clear That He Could Not Be Afforded a Fair and Impartial Trial in Ventura County.

Respondent contends that petitioner waived objection to jurors by failing to challenge those with opinions and that petitioner waived objection to venue by failure to make further motion for change of venue following voir dire examination.

Petitioner at the time of trial was well aware of Judge Blackstock's rulings on challenges to jurors in the Elizabeth Duncan trial. Reference is made in this respect to the Transcript of Record in *Duncan* v. *California*, October Term, 1960, No. 187, and to the brief of petitioner Elizabeth Duncan. Petitioner had no reason to believe that Judge

Blackstock would depart in any way from his previous rulings on challenges in the Elizabeth Duncan case.

To challenge a juror knowing that the challenge will be disallowed would be an idle act. Such action would be extremely likely to alienate not only the challenged juror, but the rest of the panel as well. This practical consideration is well recognized. See SUCCESSFUL JURY TRIALS, *Appleman*, 1952, at p. 133:

> "In exercising a challenge, it is to be borne in mind that the juror challenged may be personally affronted. The affront to him is not of immediate or direct importance, [note: author is assuming that challenge is allowed] except that it may be reflected in the feelings of the jurors who remain."

As for the failure of petitioner to make further motion for change of venue after voir dire, this would have been an equally idle act and would likely have been construed as an affront. Judge Blackstock had denied two prior motions for change of venue with the comment that he had "absolute confidence" in the people of Ventura County. Further, Judge Blackstock left the impression by prior published comments that a change of venue would reflect upon the integrity, decency and humanity of the people of Ventura County. Still further, Judge Blackstock had denied the motion of co-defendant Duncan for change of venue following voir dire examination. Again, petitioner had no reason to believe that Judge Blackstock would remove from an announced and entrenched position.

Failure to move for change of venue is important in a case such as *People* v. *Cook*, 39 C. 2d 496, 247 P. 2d 567, wherein defendant did not exhaust his peremptory challenges and announced that he was satisfied with the jury. Failure to move for change of venue until three years after

trial was considered important in *U. S.* v. *Handy*, 351 U.S. 454, when coupled with failure to exhaust peremptory challenges. Essentially, the same was true in *Stroble* v. *California*, 343 U.S. 181. However, it must be noted that the failure to move for change of venue was not considered in the above cases as some technical requirement but rather as a significant indication of merit or lack of merit. In petitioner's case, the venue question was put in issue shortly after arraignment and again shortly before trial. Failure to make further motion for change of venue was dictated by practical considerations discussed.

Conclusion

Petitioner has demonstrated that the State of California through the district attorney and other officers influenced his trial; that the pre-trial publicity was actively promoted by the district attorney; that the pre-trial publicity was inflammatory and prejudicial; that there was ample opportunity for jurors to be affected; that it was likely that jurors were affected; that some jurors in all likelihood were affected; that the trial judge encouraged the pre-trial publicity; that the trial judge contributed to community hostility; that the question is life or death and great scrutiny is warranted; and that due process was violated.

It is respectfully submitted that the judgment below be reversed and the cause remanded for retrial on the issue

of penalty in a county in California other than Ventura County.

Respectfully submitted,

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